

**UMW INDUSTRIES (1985) SDN. BHD.
(DAHULUNYA DIKENALI SEBAGAI
UMW (MALAYA) SDN. BHD.)**

v.

CHANG TOO SANG

HIGH COURT, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN

HJ. AHMAD J.

[CIVIL SUIT NO. D5-22-1220-1991]

1 OCTOBER 1992

PRACTICE AND PROCEDURE: *Application for summary judgment - Appeal against decision of SAR granting order in terms - Triable issues.*

CONTRACT: *Absolute assignment - Inordinate delay in giving notice of assignment to guarantor - Assignment effected after termination of principal agreement - Effect - Guarantee and indemnity agreements not providing for assignment - Effect.*

The defendant agreed to guarantee and indemnify Terus Credit Sdn. Bhd. (hereafter "TKSB") the payment of all sums due and payable under the hire purchase agreements entered into between TKS B and Tropical Veneer Co. Bhd. (hereafter "TVCB"). TVCB defaulted on the hire purchase agreements and pursuant to the terms of the said agreements surrendered the vehicles involved to TKS B on 15 November 1985.

On 10 May 1986, TKS B assigned all its interests, rights and title under the guarantee and indemnity agreements to the plaintiffs and notice of this assignment was given to the defendant on 8 March 1991. The plaintiffs applied for and obtained summary judgment against the defendant and the defendant appealed against the decision of the Senior Assistant Registrar.

Held:

[1] The hire purchase agreements had come to an end on 15 November 1985 when TVCB delivered the vehicles to TKS B. Consequently, the assignment of the guarantee and indemnity agreements to the plaintiff on 10 May 1986 could not be valid as it was after the date of the termination of the hire purchase agreements.

[2] The delay in notifying the defendant about the assignment amounted to inordinate delay and raised a triable issue on the facts for which summary judgment should not have been given.

[Appeal allowed].

a Cases referred to:

Hughes v. Fresh-Pack Fruit and Vegetable Market Pty. Ltd. and Levis [1965] WAR 199 (*refd*)
United Engineers (Malaysia) Ltd. v. Lai Ping Yoon [1968] 1 MLJ 189 (*refd*)

Legislation referred to:

Civil Law Act 1956, s. 4(3)
Hire Purchase Act 1967, s. 15(1)

Other sources referred to:

The Modern Contract of Guarantee by James O'Donovan and John C. Phillips p. 391

c For the plaintiff - *C.L. Chan; M/s. Skrine & Co*
For the defendant - *Siva Dharma; M/s. Kwong & Associates*

JUDGMENT

Haji Abdul Malek Bin Haji Ahmad J:

d Under two guarantee and indemnity agreements dated 15 March 1984, the defendant had agreed to guarantee and indemnify Terus Kredit Sdn. Bhd. (hereafter "TKSB") the payment by Tropical Veneer Co. Bhd. (hereafter "TVCB") of all sums due and payable under the hire purchase agreements numbered TK/A/0137/84 and TK/A/0138/84 entered into between TKS B and TVCB on the same date. The hirer TVCB had defaulted on the hire purchase agreements on 1 August 1985 and on 28 March 1985 respectively and on 15 November 1985 had surrendered the vehicles involved to TKS B. On 10 May 1986, TKS B had assigned to the plaintiff by way of absolute assignment in writing all its interests, rights and title under the said guarantee and indemnity agreements. Notice of this assignment was given to the defendant only on 8 March 1991.

g By summons in chambers filed on 19 December 1991, after the writ was filed on 14 September 1991, the plaintiff had asked for final judgment against the defendant for RM273,115.27, interest at the rate of 18% per annum from 16 November 1985 to the date of judgment and thereafter at 8% per annum until the date of realisation, solicitor-client's costs and alternatively for the statement of defence to be struck out. The principal prayers were granted by the learned Senior Assistant Registrar on 27 May 1992 and hence this appeal by the defendant.

i Having deliberated on the submissions, my view was that the hire purchase agreements had come to an end on 15 November 1985 when TVCB delivered the vehicles to TKS B as clause eight of

the said agreements reads "The Hirer may at any time before the final payment hereunder falls due determine this agreement by delivering up the goods to the owner at the owner's address stated herein.". This is of course quite in order pursuant to s. 15(1) of the Hire Purchase Act 1967. Consequently, the assignment of the guarantee and indemnity agreements to the plaintiff on 10 May 1986 cannot be valid in the circumstances as it is after the date of the termination of the hire purchase agreements. Further, the said guarantee and indemnity agreements do not provide for the assignment.

Page 391 of *The Modern Contract of Guarantee* by James O'Donovan and John C. Phillips states that "The assignment must take effect before the principal contract is determined, for example, by the creditor terminating the principal contract for the principal's breach, because otherwise the purported assignment will be ineffective in respect of accrued liabilities as being a mere right to litigate."

In *Hughes v. Fresh-Pack Fruit and Vegetable Market Pty. Ltd. and Levis* [1965] WAR 199 the first defendant, who were engaged in retail grocery, had held a lease for a term of five years with an option to renew for a further five years with the second defendant, who was a director of the first defendant, as guarantor. The plaintiff had purchased the freehold of the premises from the reversioners who were the first defendant's principals. The agreement for sale included an express assignment of the benefit and interest of the first defendant's lease. A written notice of the plaintiff's acquisition of the freehold and of the reversioners' rights under the lease was given to the first defendant on 8 May 1963. In July 1963 the first defendant alleged that it had been induced to enter into the lease by fraudulent misrepresentation, purported to rescind the lease and vacated the premises. The plaintiff then hired the contents of the shop from the first defendant, installed a manager but was not able to relet the shop until November that year. In February 1964 the reversioners had assigned to the plaintiff its rights under the guarantee given by the second defendant and notice of the assignment was given to the second defendant.

Apart from ruling that the allegations of fraud had not been proved and that the plaintiff was liable for the hire of the first defendant's equipment until the termination of the hiring, the

a Supreme Court of Western Australia had also held that "the second defendant was not liable because the lease and the guarantee contained in it came to an end upon re-entry and the assignment of the supposed benefit of the guarantee was not made until after the lease had terminated. Had there been any existing liability under the guarantee to the assignor prior to the assignment, this would have been non-assignable as being a mere right to litigate. There was no such existing liability."

b Learned Counsel for the plaintiff had referred me to subsection (3) of section 4 of the Civil Law Act 1956 which states "Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the state before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor." To my mind, this cannot apply here since the date of the notice to the defendant on 8 March 1991 is some five and a half years after the purported termination of the relevant hire purchase agreements on 15 November 1985, which also amounts to inordinate delay and raises a triable issue on the facts of this case for which Summary Judgment should not have been given by the learned Senior Assistant Registrar.

c Accordingly, I had allowed the appeal with costs.

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